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## THE RIGHT TO LOCAL SELF-GOVERNMENT.

## II.

IN 1643-44 the general assembly changed the name of the island from its Indian name of Aquethnec (Aquidneck) to "The Isle of Rhodes, or Rhode Island," by which name it has since been known. The dual name of "The State of Rhode Island and Providence Plantations," still the official style and name of the state, arose from the union of the Aquidneck government with that of "Providence Plantations," under the charter of 1663.

The general officers elected in 1641 continued in office until the government set up under the first charter was organized in 1647. The records of the general court of this union cease in 1644, and the town records of Newport are lacking. The mutilated pages of the Portsmouth town records help to fill the gap, and they confirm the fact that, if no general court was convened in this interval, town meetings were held in both towns, and their decrees were duly executed. Three of the four original colonies of Rhode Island have therefore enjoyed a period of independent sovereignty as separate towns, and two of them as a union of towns, although the united colony under the charters, both of 1643-44 and of 1663 and the state, never have been independently sovereign.

Arnold<sup>1</sup> says that: "Before that period" (the combination under the first charter) "each town was in itself sovereign, and enjoyed a full measure of civil and religious freedom."

"But in the scattered communities which grew up on Rhode Island soil between 1636 and 1647, there were lacking not only organic law in common, but even documentary agreement in common, and also any delegation of authority from outside their limits, — until the patent, whose provisions went into effect in 1647."<sup>2</sup>

As was well said in *The Nation*:<sup>3</sup> —

"The diversity of character and interest in the smallest of the colonies is another illustration of the truth taught by Greek and Italian history, that it is not always the largest States that afford the most instructive data for political history."

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<sup>1</sup> Hist. R. I. p. 487.

<sup>2</sup> Foster's *Town Government in Rhode Island*, p. 12.      <sup>3</sup> Vol. 39, p. 117.

Milton, that profound political thinker as well as poet, in his pamphlet entitled "*Ready and Easy Way to Establish a Free Commonwealth*," said, in language pregnant with meaning:—

"Nothing can be more essential to the freedom of a people than to have the administration of justice and all public ornaments in their own election and within their own bounds, without long travelling or depending upon remote places to obtain their right or any civil accomplishment, so it be not supreme but subordinate to the general power and union of the whole republic: in which happy firmness, as in the particular above mentioned, we shall also far exceed the United Provinces, by having, not as they do, to the retarding and distracting oftentimes of their counsels on urgent occasions, many sovereignties united in one commonwealth, but many commonwealths under one united and entrusted sovereignty."<sup>1</sup>

It is well known that Milton and Roger Williams were friends, and saw much of each other on Williams's visits to England. We have Williams's own testimony that he taught Milton Dutch, and in return Milton read him "many more languages." In imagination we see these two great souls communing over the establishment of these colonies, holding forth "a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concerns," and it may be that it was Williams's report to Milton of the success of that experiment in Rhode Island that led him to write the above.

Bryce says, speaking of Rhode Island:—

"This singular little commonwealth, whose area is 1085 square miles (less than that of Ayrshire or Antrim), is, of all the American states, that which has furnished the most abundant analogies to the Greek republics of antiquity, and which deserves to have its annals treated of by a philosophic historian."<sup>2</sup>

Bancroft, our great historian,<sup>3</sup> has well said:—

"The annals of Rhode Island, if written in the spirit of philosophy, would exhibit the forms of society under a peculiar aspect: had the territory of the State corresponded to the importance and singularity of the principles of its early existence, the world would have been filled with wonder at the phenomena of its history."

The existence of towns was an admitted underlying fact when the parliamentary charter of 1643 and the royal charter of 1663 were accepted, and there arose an unwritten constitution, a part of which was the right of the towns to administer their own local

<sup>1</sup> 2 Milton, *Prose Works*, Boston, 1826, 299.

<sup>2</sup> 1 *Am. Commw.* 18.

<sup>3</sup> Vol. I, p. 380.

affairs. The extent and variety of these powers of self-control over their own local affairs far exceeded those of any other state, and they continue in force at the present day in Rhode Island in nearly their full vigor.

Early in the summer of 1643 Roger Williams embarked for England from New York in a Dutch ship, being compelled to this course by the refusal of Massachusetts to permit him to pass through their limits, or to take passage in one of their ships. He had been selected by the Rhode Island government we have been considering, and that of Providence, to procure a charter for both governments. He succeeded in his efforts, and returned in 1644, bringing with him the charter uniting the three colonies of Providence, Portsmouth, and Newport as "The Incorporation of Providence Plantations in the Narragansett Bay in New England." This charter was very general in its provisions; indeed, it may be said that it conferred complete independence upon the colony. It was fettered with but one proviso, *i. e.*, that "the laws, constitutions, and punishments for the civil government of the said Plantation be conformable to the laws of England, so far as the nature and constitution of that place will admit."

But it was not until May, 1647, that the freemen of the three colonies named in the charter — Providence, Portsmouth, and Newport, together with the freemen of Warwick, another colony, settled the year Roger Williams was sent to England to procure this charter — met at Portsmouth, accepted the charter, and formed a government under it for the united colony that afterwards became the state of Rhode Island. The record of this meeting at Portsmouth is to be found in 1 R. I. Col. Recs. 149 to 207, and should be carefully studied by every one investigating the genesis of this state. The following are extracts from this record: —

"2. It was Voted and found that the major parte of the Colonie was present at this Assembly, whereby there was full power to transact."<sup>1</sup>

That is to say, this first meeting of the incorporated, formally held, to accept the charter, was in fact what the name imports, a general assembly of the whole body of freemen.<sup>2</sup>

It was agreed that a quorum of forty might "act as if the whole were present, and be of full authority." The general assembly

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<sup>1</sup> 1 R. I. Col. Recs. 147.

<sup>2</sup> The freemen of the towns continued to meet thus in Newport, either in person or by proxy, every May and October, to decide who should represent them in the General Assembly for the next six months, until 1760. 6 R. I. Col. Recs. 256.

being thus organized, "It was agreed that all should set their hands to an engagement to the charter." The representative system was adopted by ordering that "a week before any general court, notice should be given to every town by the head officer that they chose a committee for the transaction of the affairs there," and they provided for a proxy vote in the words, "and such as go not may send their votes, sealed." They then adopted a remarkable code of laws, and elected general officers by ballot, to continue in office for one year, or till new be chosen.

Warwick, founded in 1642-43, was admitted to the union, although not named in the charter, the record being: "It was agreed that Warwick should have the same privileges as Providence,"<sup>1</sup> thus furnishing a precedent for the admission of other towns afterwards, and putting them all on the same footing.

The growth of Warwick had been hindered by dissensions among its founders; an attempted surrender of jurisdiction, by some of the settlers, to Massachusetts; the foray from Massachusetts of officers and forty soldiers that captured the Gortonists after a siege, carried them as prisoners to Boston, where they were tried for heresy and sedition and found guilty, as "blasphemous enemies of the true religion of our Lord Jesus Christ and His holy ordinances, and also of all civil authority among the people of God, and particularly in this jurisdiction."

Gorton and six others were sentenced to be confined in irons during the pleasure of the court, to be set to work, and to suffer death should they break jail or in any way proclaim heresy or reproach to the church or state. Their cattle were appraised and sold to defray the cost of seizure and trial. Massachusetts continued her claim of jurisdiction over Warwick until 1665, with warning against any one's settling there without leave of their general court, forbidding the return of the Gortonists after their release from jail, and placing their houses at the disposal of petitioners for the Warwick land.

Extract from report of the king's commissioners concerning the New England colonies, made December, 1665: —

"The Matachusetts did maintain Pumham (a petty sachim in this Province) twenty yeares against this Colony, and his chiefe sachim, and did by armed soldiers besiege and take prisoners Mr. Gorton, Howden, Wykes, Greene and others in this Province, and carry'd them to Boston, put them in chaines, and took eighty head of cattle from them, for all which they could never get satisfaction."<sup>2</sup>

<sup>1</sup> 1 R. I. Col. Recs. 148.

<sup>2</sup> John Carter Brown MSS. 1, No. 63.

At the first general assembly held at Portsmouth in 1647 to accept the charter, and to organize the new government under it, the following was adopted: —

"For the Province of Providence, It is agreed by this present Assembly thus incorporate, and by this present act declared, that the forme of Government established in Providence Plantations is **Democratically**, that is to say, a Government held by y<sup>e</sup> free and voluntarie consent of all, or the greater parte of the free Inhabitants."<sup>1</sup>

The instructions from the town of Providence to its committee, which, with other committees from the towns of Portsmouth, Newport, and Warwick, were to meet at Portsmouth on the 18th of May, 1647, for the purpose of accepting the charter and organizing a government under it, may be found in 1 R. I. Col. Recs. 42, and are deserving of study. The second instruction is copied in the following record of the proceedings thereupon of the general assembly:—

"6. It was ordered, upon the request of the Commissioners of the Towne of Providence, that their second instruction should be granted and established unto them, Vidyt. Wee do voluntarily assent and are freely willing to receive and to be governed by the Lawes of England, together with the way of the Administration of them, soe far as the nature and constitution of this Plantation will admit desiring (soe far as possible may be) to hold a correspondence with the whole Colonie in the modell that hath been lately shewn vnto us by our worthy Friends of the Island, if the Generall Courte shall compleat and confirm the same, or any other Modell as the Generall Courte shall agree vpon according to our charter."<sup>2</sup>

Obviously the example set by the union of the two island towns was bearing fruit. It had been tried, found to work well, and now Providence desired to join the union, and to follow the "Modell" set.

In 1648–1649 a special general assembly was held at Warwick, in March, but there is no record of their proceedings (Staples, *Annals of Providence*, 72). At this session the following charter was granted to the town of Providence, obviously in reply to the foregoing application: —

"Whereas, by virtue of a free and absolute charter of civil incorporation granted to the free inhabitants of this colony of Providence, by the Right Honorable Robert, Earl of Warwick, Governor in chief with the rest of the Honorable Commoners bearing date the 7th day of March, 1643, giving and granting full power and authority unto the said inhabitants to govern themselves and such others as shall come among them, as also to

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<sup>1</sup> 1 R. I. Col. Recs. 156.

<sup>2</sup> *Ib.* 147, 1647.

make, constitute and ordain such laws, orders and constitutions, and to inflict such punishments and penalties as is conformable to the laws of England, so near as the nature and constitution of the place will admit, and which may best suit the estate and condition thereof, and whereas the said towns of Providence, Portsmouth, Newport and Warwick are far remote each from other, whereby so often and free intercourse of help, in deciding of differences and trying of causes and the like, cannot easily and at all times be had and procured of that kind is requisite: therefore upon the petition and humble request of the freemen of the Town of Providence, exhibited unto this present session of the General Assembly, wherein they desire freedom and liberty to incorporate themselves into a body politic, and we, the said Assembly, having duly weighed and seriously considered the premises, and being willing and ready to provide for the ease and liberty of the people, have thought fit and by the authority aforesaid, and by these presents, do give, grant and confirm unto the free inhabitants of the town of Providence, a free and absolute charter of civil incorporation and government to be known by the Incorporation of Providence Plantation in the Narragansett Bay in New England, together with full power and authority to govern and rule themselves, and such others as shall hereafter inhabit within any part of the said Plantation, by such a form of civil government as by voluntary consent of all, or the greater part of them, shall be found most suitable unto their state and condition: and to that end, to make and ordain such civil orders and constitutions, to inflict such punishments upon transgressors, and for execution thereof, and of the common statute laws of the colony agreed unto, and the penalties, and so many of them as are not annexed already unto the colony court of trials, so to place and displace officers of justice as they or the greater part of them shall, by one consent, agree unto. Provided nevertheless, that the said laws, constitutions and punishments, for the civil government of the said plantation, be conformable to the laws of England, so far as the nature and constitution of the place will admit, yet always reserving to the aforesaid General Assembly power and authority so to dispose the general government of that plantation as it stands in reference to the rest of the plantations as they shall conceive, from time to time, most conducing to the general good of the said plantations. And we the said Assembly, do further authorize the aforesaid inhabitants to elect and engage such aforesaid officers upon the first second day of June annually. And moreover, we authorize the said inhabitants, for the better transacting of their public affairs, to make and use a public seal as the known seal of Providence in the Narragansett Bay, in New England.

"In testimony whereof, we, the said General Assembly, have hereunto set our hands and seals the 14th of March anno 1648.

"JOHN WARNER, Clerk of the Assembly."<sup>1</sup>

<sup>1</sup> Staples, *Annals of Providence*, p. 72, copied thence in 1 R. I. Col. Recs. 214, but with spelling changed.

Staples, in *Annals of Providence*, p. 74, says: —

"This charter was intended to strengthen the municipal government of Providence. To have been more useful, it should have prescribed a form of government to be adopted. There is no reference to this charter in the records of the town, neither a petition for it, nor acceptance of it. There is a copy of it in the city clerk's office, engrossed on parchment, which is now almost illegible. A similar charter, bearing date the same day, was granted to Warwick; and, it is presumed, Portsmouth and Newport had like charters."

Unfortunately this copy engrossed on parchment has disappeared since Staples's time. But for Staples, we should not now know that such a charter had ever been granted. It is true a portion of this charter is to be found recorded at p. 70 of the "Old Burnt Book," so called, of the Records of Providence, being the second book of the Town of Providence. This portion may be found reprinted in vol. 2 of the invaluable *Early Records of the Town of Providence*, printed by the Record Commissioners of the City of Providence in 1893, where an interesting account will be found of the vicissitudes this book has undergone. When the town was partially destroyed by fire by the Indians in 1676, this original volume, with other town records, narrowly escaped destruction. The original spelling of the portion still extant is given<sup>1</sup> as illustrative of the accuracy and historical value of the work of these commissioners.

"all, or the greatest part of them shall be found most sutable to their estate & condition, & to that end, to make & ordain such Civill orders & Constitutions, & to inflict such punishments upon transgressors; & for execution thereof & of the Comon Law of the Colony agreed unto, & the penalties & so many of them as are not añexed already unto the Colony Court of Tryall to place & displace Officers of Justice, as they or the greatest part of them shall by free consent agree unto, provided neverthesse, that the said Lawes, Constitutions & punishments for the Civill Government of the said Plantation, be conformable to the Lawes of England, so far as the nature & constitution of that place will admit: yet always reserving to the abovesaid Generall Assem<sup>b</sup>: power & Authority to dispose the Gen: Government of y<sup>t</sup> Plantation, as it stands in reference to the rest of the Plantations: & we the said Assem<sup>bly</sup> do further Authorize the aforesaid Inhabitants to elect & ingage all such aforesaid Officers upon the 1st 2nd day of June Annually; And moreover we authorize the said Inhabitants for the better transacting of their publike affaires to make & use a Publike Seale as the Known Seale of Providence Plantation In the Narraganset Bay In New England. In

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<sup>1</sup> 2 *Early Records of the Town of Providence*, 113.



testimony whereof, we the said Gen: Assemb: have hereunto set o' hands & Seale, the 14th of March 1648 Portsmouth John Warner Clerke of the Assembly."<sup>1</sup>

Nor can it be claimed that the effect of granting a charter to each one of these four towns at this meeting of the first general

<sup>1</sup> Letters in italics are missing, and have been supplied from a transcript made for the town in 1800.

The Warwick act was as follows : —

"Whereas by virtue of a free and absolute Charter of civill incorporation, granted to the free inhabitants of this Colony or Province by the right honourable Robert Earle of Warwicke, Governour in Chiefe with the rest of the honorable Commissioners, bearing date the fourteenth day of March in the year one thousand six hundred and forty three, givinge and granting full power and authority unto the sayd inhabitants to govern themselves and such others as shall come among them ; as also to make, constitute, and ordayne such lawes, orders and constitutions, and to inflict such punishments and penalties, as is conformable to the Laws of England, so neare as the nature and constitution of the place will admit ; and which may best suit the estate and condition there ; and whereas the sayd towns of Providence, Portsmouth, Newport, and Warwick are far remote each from other whereby so often and free intercourse of helpe in desidinge of differences and trying of causes and the like, cannot easily and at all times be had and procured as in this kind is requisitt ; Therefore, and upon the petition and humble request of the freemen of the Towne of Warwicke exhibited unto this present session of General Assembly, wherein they desire freedom and liberty, to incorporate themselves unto a body politicke etc. Wee the sayd Assembly havinge duly weighed and seriously considered the premises and beinge willinge and ready to provide for the ease and liberty of the people have thought fit and by the autorite aforesaid and by these presents doe give, grant, conaigne and confirm this present charter to the sayd inhabitants of the Towne of Warwicke, allowing, orderinge and hereby authorizing them or the maior part of them from time to time to transact all such Town afayres as shall fall within the verge, liberties and precincts of the sayd town ; and also to make and constitute such particular orders, penalties and officers as may best suite with the Constitution of sayd Towne and Townshippe for the well ordering and goveringe thereof ; provided the sayd lawes constitutions and punishments for the civil government thereofe be conformable to the Lawes of England, so far as the nature and constitution of that town will admit ; and to that end we doe authorize them to erect a Court of Justice and do give them power to execute such particular orders and penalties, and so many of the common lawes agreed in the Generall, and their penalties as are not annexed already to the General Court of Tryalls ; and further we do hereby order the sayd town to elect and engage all such officers as shall be necessary for the propagation of Justice and judgement therein, upon the first Monday in the Month of June annually forever hereafter : shall engadge them in fidelity to maintaine the honor, crown and dignity of the State of England as loyal subjects thereofe to the utmost of their power, the liberties and freedom of this Collony and the privileges of the town wherein they bear office, and further wee do hereby invest and authorize the sayd officers so elected and engaged with full power to transact in the premises and in so doinge shall be hereby secured and indemnified.

"Given at Portsmouth at the General Assembly, there held this 14th day of March anno. 1648.

"JOHN WARNER,

Clerk of the Assembly.

"Copia Vera sicut attestat JOHANNES GREENE, Secritaris ex civitate Warwick."  
(Fuller, Hist. Warwick, 32.)

assembly was, that the four towns surrendered all their original powers to the colony, and, receiving the charters from the colony, continued afterwards to exercise their original powers under the grant from the colony. Cooley meets this well when he says: <sup>1</sup> "What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly with more regularity than before."

Certainly these charters contain nothing that would confirm the theory that the general assembly had all powers, and the town had only such powers as the general assembly conferred upon it. While power is reserved to the general assembly to pass general laws ("so to dispose the general governmente of that plantation as it stands in reference to the rest of the plantations as they shall conceive, from time to time, most conducing to the general good of the said plantations"), the freemen of the town of Providence are incorporated, with power, as formerlye "to governe and rule themselves and such others as shall hereafter inhabit within any part of the said plantation, by such a form of civil government as by voluntarie consent of all, or the greatest part of them, shall be found most sutable to their estate & condition," that is to say, in their own affairs they were to continue, as of old, to govern themselves. This, they and all the other towns in Rhode Island have ever continued to do and still continue to do, save for the instances, or attempts at instances, on the part of the political machine possessing the power in the general assembly to pass laws that would infringe upon these powers of local self-government.

It is noteworthy, also, that the power of the town over its own local courts was acknowledged and continued by this charter. The town was "to make & ordain such Civill orders & constitutions & to inflict such punishments upon transgressors; & for execution thereof & of the Comon Law of the Colony agreed unto, & the penalties & so many of them as are not añexed already unto the Colony Court of Tryall to make & displace Officers of Justice as they, or the greatest part of them, shall by free consent agree unto, provided nevertheless," . . . &c.

Nor can it be claimed that here is a new grant of powers by the colony to a town that obtained these powers only by this grant. On the contrary, this charter is but a confirmation of powers the town already had, before the colony was in existence, and which therefore it in no wise derived from the colony.<sup>2</sup>

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<sup>1</sup> In *People v. Hurlbut*, 24 Mich. 44, at p. 100 (1871).

<sup>2</sup> The following letter, written in 1832 by John Howland, is significant in this con-

The controversy between Rhode Island and Massachusetts over the next town admitted to Rhode Island (Westerly, in 1669) is illustrative of the fact already shown, — that the early towns of Rhode Island were first settled and afterwards admitted to the union. Massachusetts claimed the whole Pequot country by right of conquest, and erected the tract on both sides of Pawcatuck river, which is now the westerly boundary of Rhode Island, into the township of Southertown, and attached it to the county of Suffolk. In 1660 William Vaughn and others, of Newport, bought part of this land, called Misquamickock, afterwards Westerly, of the Indians, and thirty-six settlers from Rhode Island took possession. Upon complaint to the Massachusetts general court from settlers on the east side of Pawcatuck river, a warrant was issued to the constable of Southertown to arrest the trespassers. They were taken to Boston and committed for want of bail. They were tried, sentenced to pay a fine of forty pounds, to be imprisoned until it was paid, and to give sureties for one hundred pounds to keep the peace. Rhode Island denied the right of Massachusetts to the jurisdiction asserted, and a controversy arose between the two colonies. Connecticut joined, ordering the inhabitants of Mystic and Pawcatuck not to exercise authority under commissions from any other colony. In 1663 a house was torn

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nection. A soldier in the Revolutionary war, he settled in Providence after the war was over, followed the humble profession of a barber, and lived to great old age. A self-educated man, he left his mark on the city as the founder and first president of the Providence Institution for Savings, the principal savings bank in the state. In this letter to Rev. James Knowles he said: "You ask me for a copy of the act incorporating the town. I have not searched for it, but intend to. If I had lived in those days I should have opposed receiving such an act from the general assembly. The four original towns made the general assembly, and they could confer no power which was not already possessed by the old towns. New towns might be incorporated, but it was absurd for the old ones to receive authority from their own agents or deputies. We saw and felt the disadvantages of this pretended act of incorporation two or three years ago, when the school bill was discussed and passed. The assembly then claimed the power to restrict the towns from levying taxes for the support of schools, as they said no such power was granted them in their acts of incorporation, and that all the power of the towns was derived from special acts of the general assembly. But the truth is, the old towns had from their first settlement the power to assess taxes for this as well as for other purposes, and they did not relinquish it when they received their corporate powers. The acts of incorporation could not grant or restrict, but only confirm, the powers already existing, which were not contrary to the laws of England." (Stone, *Life and Recs. of John Howland*, 256.) This man understood thoroughly, not from books, but from his practical knowledge derived from a long life under the institutions he wrote about, the Rhode Island ideas about local self-government. He represented what has always been the common understanding of the people of the state, and the entire past history, development, and legislation of the state has voiced that understanding.

down by residents of Southertown because it was claimed to be within the asserted jurisdiction of Rhode Island. William Marble, a deputy from the marshal of Suffolk, bearing a letter to the Westerly settlers on this subject, was arrested, sent to Newport, and confined in prison eleven months. In 1665 a royal commission, appointed to settle these and other controversies, decided that no lands conquered from the natives should be disposed of by any colony unless the conquest was just and the soil was included in the charter of the colony, and that no colony should attempt to exercise jurisdiction beyond its chartered limits. This put an end to the asserted right of jurisdiction of Massachusetts.<sup>1</sup>

May, 1669, the general assembly voted:—

"This Court taking notice of the returne by the committee, to wit: Mr. John Easton, Mr. Benjamin Smith, James Greene, Edward Smith, Caleb Carr and William Weeden, in reference to the petition or desire of the people inhabiting at Musquamacott and Pawcatuck in the King's Province, to be made a townshipp, it being and lying within this jurisdiction, as by his Majestyes Letters Pattents it may appear, and considering the Power by his Majesty given to this Assembly to order and settle townes, cities and corporations, within this said Jurisdiction, as shall seem meet. \* \* \* Be it therefore enacted by this Assembly, and by the authority thereof that \* \* \* shall be knowne and called by the name of Westerly; and shall be reputed and deemed the fifth town of this Collony: and shall have, vse and enjoy all such priviledges, and exercise all such methods and formes for the well ordering their towne affaires as any other towne in this Collony may now vse and exercise: and they shall have liberty to elect and send two Deputyes to sitt and act in the Genneral Assemblys of this Collony from time to time \* \* \*."<sup>2</sup>

The settlement of Block Island, its history and incorporation as New Shoreham, the sixth town, still further illustrates this.

At first under the jurisdiction of Massachusetts, it was granted to Governor Endicott and three others, in 1658, as a reward for their public services. They sold it in 1661 to Simon Ray and eight associates, who began a settlement there in 1662, liquidated the Indian title subject to a reservation in favor of the natives, and set apart one sixteenth of the land for the support of a minister forever. One Dr. Alcock also claimed title to the island, by purchase of "some in Boston (who took upon them power never granted them to sell it)."<sup>3</sup> Under the charter of 1663 Block Island became a part of Rhode Island. In 1664 it was

<sup>1</sup> 1 Arnold, Hist. R. I. 276, 282, 316.

<sup>2</sup> 2 R. I. Col. Recs. 250, 257

<sup>3</sup> 2 Ib. 128.

"Resolved by this Assembly: That the Governor and Deputy Governor be desired to send to Block Island to declare unto our friends the inhabitants thereof, that they are vnder our care, and that they admit not of any other to beare rule over them but the power of this Collony."<sup>1</sup>

Petitions were presented to the general assembly in 1664 by the inhabitants of the island, for admission as freemen of the colony. They were referred to a committee which reported a letter that was sent, and may be found in 2 R. I. Col. Recs. 53, setting forth in detail how the inhabitants are to be admitted and sworn in as freemen of the colony. November 6, 1672, the island was incorporated as New Shoreham, "as signs of our unity and likeness to many parts of our native country." The act<sup>2</sup> expressly recognizes their existing form of government and continues some of its features. This is still the law.

Although under the jurisdiction of Rhode Island since 1663, Block Island continued to govern itself in all matters until 1672, and the act incorporating it well deserves study from the light it throws upon the way in which this little isolated community had worked out its own system of government, retained part of it when it was incorporated, and has continued to exercise it ever since, even gaining admission of its established right to exemption from military duty ("until otherwise prescribed by law") in Art. XIV., Sec. 4, of the constitution of 1842, still in force.

By the act of incorporation the inhabitants were required

"To meete four times in the yeare for their said towne affaires, for the making of such order or bye laws as may be needfull for their better management of their affaires among themselves according to their constitution, not opugninge the lawes of his Majestie's realme of England, his patent, nor the laws of this colony, agreeable thereto."

On account of the distance by sea, so that often the inhabitants could not reach the mainland "because of danger and hinderings divers ways," the wardens were empowered, following their custom already established before their incorporation, "to hold pleas of actions of account, debt, detinue, trespass and of the case to the value of five pounds sterling of New England money," \* \* \* "and to proceed in the said actions according to the lawes of his Majestie's realme of England (so farr as the constitution of the place will admitt) and accordinge to due forme of lawe in this Collony agreeable thereto."

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<sup>1</sup> 2 R. I. Coll. Recs. 32.

<sup>2</sup> *Ib.* 55, 466-470.

"The remoteness of the island rendered it almost independent of the colony, and produced a different system from that which prevailed in the other towns."<sup>1</sup>

The wardens of New Shoreham still join persons in marriage in the town, a privilege not enjoyed in any other town in the state.

It is evident this town was not the creature of the state, but came into it with established powers of its own that it still continues to enjoy.<sup>2</sup>

King's Towne, afterwards Kingston, now North and South Kingstown, the seventh town, was settled in 1641. In October, 1674, it was

"Voted by the King's authority in this Assembly, it is approved the General Councill's acts in obstructinge Connecticut Colony from useinge jurisdiction in the Narragansett country and the Councill's establishing a townshipp there, and the calling it Kingstown, with liberty as hath been granted to New Shoreham; \* \* \* \* and that futurely it shall be lawfull to summons as many of our inhabitants as they see cause to attend at Narragansett to oppose Connecticut from useinge jurisdiction there: but not in any hostile manner, or to kill or hurt any person."<sup>3</sup>

In 1679 it was

"Voted, the Recorder shall draw forth the copy of the act of the Generall Assembly in October, 1674, concerninge the confirming of the act of the Generall Council, in establishing a townshipp in Narragansett, and calling it King's Towne, which shall be sent to the inhabitants there, under the seale of the Collony."<sup>4</sup>

East Greenwich, the eighth town, was incorporated in 1677. This would seem to be the first town that was incorporated first and settled afterwards.

Arnold, p. 428, says:—

"A tract of five thousand acres was laid out in two parts, one of five hundred acres on the bay, for house lots, and the remainder in farms of ninety acres each, and distributed among fifty men, who were now incorporated as the town of East Greenwich."<sup>5</sup>

At p. 588 it declares:—

"And to the end that the said persons and their successors, the proprietors of the said land from time to time, may be in the better capacity to manage their public affairs, this Assembly doe enact and declare that the said plantation shall be a towne, by the name and title of East Green-

<sup>1</sup> 1 Arnold, Hist. R. I. 304.

<sup>2</sup> 2 R. I. Col. Recs. 525.

<sup>3</sup> See the act, 2 R. I. Col. Recs. 586.

<sup>4</sup> Gen. Laws R. I. cap. 191, sec. 8.

<sup>5</sup> 3 R. I. Col. Recs. 55.

wich, in his Majesty's Collony of Rhode Island and Providence Plantations, with all rights, libertys and priviledges whatsoever unto a towne appertaininge."

Jamestown, the island the Indian name of which was Quononoquitt (now Conanicut), was incorporated as the ninth town, in 1678, although it was settled before then. The record is very brief: —

"Voted, that the petition of Mr. Caleb Carr and Mr. Francis Brinley, on the behalfe of themselves and the proprietors for Quononoquitt Island to be made a township, shall be first adjetated and debated.

"Voted, That the said petition is granted; and that the said Quononoquitt shall be a township, with the like priviledges and libertyes granted to New Shoreham."

Some of the peculiar features of its town government are still preserved, protected by law. It still elects its wardens, whose "warden's courts" have the same jurisdiction as the district courts in other parts of the state.<sup>1</sup>

No further change as to towns took place until 1730, when "an act for erecting and incorporating the outlands of the town of Providence into three towns" was passed. Smithfield, Scituate, and Glocester were thus incorporated; and, in language almost identical with that cited above in the acts incorporating the previous towns, it was enacted "and that the inhabitants thereof from time to time (in the case of Glocester 'for the time being') shall have and enjoy the like benefits and privileges (or liberty) with other towns in this colony, according to our charter (or agreeably to our charter — or by our charter do)."<sup>2</sup>

These citations are enough to sustain our contention that as new towns were incorporated they were granted the same benefits, privileges, and liberties that were enjoyed by the four original towns or colonies that existed before there was any united colony, and that they came into that united colony with certain well-established rights, one of which was the right to manage their own local affairs.

Discussion upon the referendum and the initiative is in vogue, but not even Oberholzer in his work on the subject calls attention to the fact that it was in Rhode Island in 1647, when the four already existing colonies organized under the parliamentary charter of 1643-4, the referendum was first introduced. The matter is of such importance as to require, for full understanding, the citation of the legislation adopted.

<sup>1</sup> Gen. L. R. I. cap. 228, § 24.

<sup>2</sup> R. I. Col. Recs. 442.

"7. It was unanimously agreed, That we do all owne and submit to the Lawes, as they are contracted in the Bulke with the Administration of Justice according thereto, which are to stand in force till the next Generall Courte of Election, and every Towne to have a Coppie of them, and then to present what shall appeare therein not to be suitable to the Constitution of the place, and then to amend it."<sup>1</sup>

That is, whatever law of the general assembly was found not to conform to the constitution of compact or agreement of each town was to be amended. The freemen of the towns were jealous of their town rights, and took this means to preserve them.

"11. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded. The Towne where it is propounded shall agitate and fully discuss the matter in their Towne Meetings and conclude by Vote: and then shall the Recorder of the Towne, or Towne Clerke, send a copy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if vnto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate, discuss and determine y<sup>e</sup> matter among themselves: and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding, the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the votes: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."<sup>2</sup>

It is believed that in this statute is found the earliest known instance of the initiative and referendum, now so much admired in the Swiss constitution.

Arnold<sup>3</sup> says: —

<sup>1</sup> 1 R. I. Col. Recs. 147.

<sup>2</sup> *Ib.* 148.

<sup>3</sup> 1 Hist. R. I. 203.



"The mode of passing general laws was then prescribed and deserves attention for the care with which it provides for obtaining a free expression of the opinions of the whole people. All laws were to be first discussed in the towns. The town first proposing it was to agitate the question in town meeting and conclude by vote. The town clerk was to send a copy of what was agreed on to the other three towns, who were likewise to discuss it and take a vote in town meeting. They then handed it over to a committee of six men from each town, freely chosen, which committee constituted the General Court, who were to assemble at a call for the purpose, and if they found a majority of the colony concurred in the case, it was to stand as a law, 'till the next General Assembly of all the people,' who were finally to decide whether it should continue as law or not. Thus the laws emanated directly from the people. The General Court had no power of revision over cases already presented, but simply the duty of promulgating the laws with which the towns had entrusted them. The right to originate legislation was, however, vested in them, to be carried out in this way. When the court had disposed of the matters for which it was called, should any case be presented upon which the public good seemed to require their action, they were to debate and decide upon it. Then each committee, on returning to their town, was to report the decision, which was to be debated and voted upon in each town; the votes to be sealed and sent by each town clerk to the General Recorder, who, in presence of the President, was to count the votes. If a majority were found to have adopted the law, it was to stand as such till the next General Assembly should confirm or repeal it. The jealousy with which the people maintained their rights, and the checks thus put upon themselves in the exercise of the law-making power, as displayed in this preliminary act, present most forcibly the union of the two elements of liberty and law in the Rhode Island mind."

The law stood thus until 1650, when the following act was passed:—

"Whereas, by the powre of the last General Assemblie for election, held at Newport in May last, where, by authority, an act was then established, that the Representative Committee should have the full powre of ye Generall Assembly; and who, when being lawfully mett, and orderly managed, did toward the latter end of that sessions, enact and give order for a new election of another representative, to assemble and sit with the like authoritie in October following: the which being accordingly now assembled and orderly managed, do by the authority and powre of the said ordinance, in the name and powre of the free people of this State, enact these lawes following.

"It is ordered that from henceforth the representative committee being assembled and having enacted law or lawes, the said lawes shall be returned within six dayes after the breaking up or adjournment of that

Assemblie; and then within three days after the chiefe officer of the Towne shall call the Towne to the hearing of the Lawes so made; and if any freeman shall mislike any law then made, they shall send their votes with their names fixed thereto vnto the General Recorder within tenn dayes after the reading of thoss lawes and no longer. And if itt appeare that the major vote within that time prefixed, shall come in and declare itt to be a nullity, then shall the Recorder signifie it to ye President, and the President shall forthwith signifie to ye Townes that such or such lawes is a null, and the silence to the rest shall be taken for approbation and confirmation of the lawes made: and it is ordered further, that the eleventh lawe made at Portsmouth, May 20, 21 — 1647 is repealed.”<sup>1</sup>

In 1658 the law was changed, as follows:—

“12. Whereas, it is conceived a wholesome liberty for the whole or major parte of the free inhabitants of this collony orderly to consider of the lawes made by the Commissioners’ Courts: and upon finding discommodity in any law made by the sayd court, then orderly to show their dislike, and soe to invalid such a law.

“It is therefore ordered and declared by this present Assembly, that from henceforth the Generall Recorder upon [such] pennalty as shall be Judged meete by a court of commissioners, shall send in to each towne a coppie of the lawes that are made at such courts, soe as they may be delivered to the Town Clarke of each towne within ten daies after the dissolution of each court from time to time; and then the townes to have tenn daies time longer to meete and publish the sayd lawes, and to consider of them. And in case the free inhabitants of each towne, or the major parte of them doe in a lawfull assembly vote down any law, and seale up the voates, and send them to the Generall Recorder within the sayd tenn daies: and that by the voates it doth appeare that the major parte of the people in each towne have so dissalowed it, then such a law to bee in noe force; and otherwise if that bee not soe done within the twenty daies after the dissolution of each court, then all and every law to be in force: And however all to be in force that are not soe disannulled, and the townes shall pay the charge of sendinge the foresayd coppies. Further, the Recorder is to open the sayd voates before the President, or in his absence, before the Assistant of the Towne where the Recorder lives, and then the President or such Assistant to give notice to the rest of the majestates.”<sup>2</sup>

This allowed ten days for the recorder to furnish each town clerk with a copy of the acts of the session, and ten more for the towns to consider them, and, if they disapproved them, to notify the president and thus to annul the statute. The provision that any

<sup>1</sup> 1 R. I. Col. Recs. 228.

<sup>2</sup> *Ib.* 401.

law not so disannulled was nevertheless to go into effect, marked, however, the beginning of the decline of this peculiar system. Had it been provided that no law of the general assembly was to go into effect until approved by the towns, the system would have been more permanent.

In 1660 this was amended, as follows:—

“Whereas, there is a certayne clause in a law made at Warwick, November the 2d 1658, touthching the people's libertie to disannull any law to them presented from the Courts of Commissioners, as there is premised: by which clause it seems the priviledges are not soe clearly evinced as the Commissioners thereby and therein did intend in formeinge the same law, in regard of this clawse (that the major parte of each Towne in the Collony must send in their voates of their towne to the Generall Recorder, to disallow any law that should be soe presented, within tenn daies after it is presented to the Towne, if they conceive such, or any such law not wholesome). It is therefore ordered, by the authority of this present Assembly, that the aforesaid clause be rectified, and that instead thereof it be enacted, and it is hereby enacted, that there be three months time, that is to say, fowre score and six daies allowed for the returne of the voates from each towne unto the General Recorder after that such lawes be presented (in such order and time as by the foresayd law is provided) to each towne:

As alsoe wee further enact that it apeareinge by the returne of the voates, that the major parte of the free inhabitants of this Collony have disapproved or disannulled any such law or lawes, then the sayd law or lawes to be of noe force; although any one towne or other should be wholly silent therein, or otherwise such law or lawes to be in force according to the true intent of the other parte or clause in the above sayd law of November the 2d 1658; and this foresayd addition to stand and be in full force, any law or lawes, or any clawes or clawses in any former law contayned, to the contrary notwithstandinge.”<sup>1</sup>

Besides allowing more time to disannul a law (three months instead of ten days), a majority of all the votes in the colony was substituted in the place of a majority in each town. This was a great step towards consolidation of the united government.

The new charter was obtained in 1663, but it made no change in the relation of the towns to the colony. In 1664:—

“It is ordered and inacted by this Assembly. That whereas ther are severall lawes extant amongst our former lawes inconsistant with the present Government, as houlding of Courts of Commistions, and repealing of the acts of the General Assemblies by votings in town meetings:

together with several other of like nature, which are contradictory to the forme of the present government, erected by his Majesties gracious letters patent, that all such lawes be declared null and voyd, and that all other lawes be of force vntill some other course be taken by a Generall Assembly for better provision hereinafter: and further, wee declare, that all obligations formerly taken to the Court of Triallles to be houlden in Newport, the second Tusday of this instant, March, be of full force and vertue to make each parson responsible to the sayd court."<sup>1</sup>

It is to be noticed that, although this act annulled the laws under which the towns could annul the acts of the general assembly, it was silent as to those laws under which the towns could initiate new laws. They would seem to have become extinct merely through non-use. It would seem, also, that the act was intended to be provisional only ("vntill some other course be taken by a General Assembly for better provision herein"). "From these provisions," says Governor Hopkins, "came the common story, that some towns had heretofore repealed acts of the general assembly."<sup>2</sup> This remark shows that at the time Governor Hopkins wrote, the people had forgotten what the original powers of the towns were.

We find, therefore, that the power of the freemen of the towns to annul the laws passed by the general assembly lasted through the life of the first charter and was not abolished until after the adoption of the second charter, while the power of the freemen of the towns to initiate legislation has never been formally abolished, but is only lost through non-use. It is evident that the original towns or colonies of Rhode Island possessed governmental powers of their own before there was any united colony; that they formed the colony, subsequently the state, and gave up some of their powers to it; that new towns were settled and admitted to the union upon the same footing as were original towns, with all the rights, powers, and duties of the four original towns; that little by little the power of the colony, afterwards the state, has increased and that of the towns has diminished; that this has been done with their consent; but among the rights still reserved to the towns and cities of this state are the right of existence and the right to manage their own local affairs, free from the interference or control of the general government except through the exercise of its undoubted power to pass general laws applicable to all alike.

*Amasa M. Eaton.*

[To be continued.]

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<sup>1</sup> 1 R. I. Col. Recs. 27.

<sup>2</sup> 7 R. I. Hist. Colls. 45.